Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1384

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
Petitioner,

—*v.*—

HUDSON WATERWAYS CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENT HUDSON WATERWAYS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Is the Court's finding that Petitioner was negligent in failing to properly inspect and service REPUBLICA DE COLOMBIA's ("COLOMBIA") defective unseaworthy electrical steering system after actual notice of the breakdown on August 13, clearly erroneous?

2. If not, does such negligence and unseaworthiness furnish a basis for assessing fault in a collision case?

3. Is the apportionment of fault in this case clearly erroneous?

Statement of the Case

A. Prior proceedings

This admiralty limitation of liability case and five related cases were tried before the Honorable Charles L. Brieant on June 20, 21, 24 and 25, 1974 without a jury. Ten fact,[1] and all the expert, witnesses were observed and heard by the trial judge and the trial record,[2] and some 231 documents marked in evidence were submitted to the Court together with direct and reply briefs on September 3, 1974.[3] Thereafter on March 30, 1977, the trial court filed a carefully and painstakingly prepared opinion with findings of fact and conclusions of law comprising some 53 pages, in which the Court apportioned the liability 82.5% to Petitioner and 17.5% to Respondent Hudson (because of "TRANSHAWAII's failure to notice COLOMBIA's change of course" (53a)), denied Petitioner the right to limit liability and to recover general average contributions from cargo owners.

An appeal by Petitioner and a cross appeal by Respondent Hudson, taken to the Court of Appeals for the Second Circuit, were argued on November 14, 1977 and on November 16, 1977, the Court of Appeals dismissed both appeals and affirmed the judgment of the District Court on the opinion of the trial judge (1a). Thereafter Petitioner filed a petition for rehearing containing a suggestion that

[1] The fact witnesses included Chief Officer Rodriguez in charge of the watch on the COLOMBIA.

[2] The trial testimony together with the deposition evidence and record of the hearings before the United States Coast Guard, marked into evidence, created a record of about 2,000 pages.

[3] While the case was *sub judice*, this Court Decided *U.S.* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (May 19, 1975) and the trial judge called a hearing of the attorneys in this case to discuss the applicability of *Reliable Transfer* to the facts in the instant case.

the action be reheard en banc. Both the petition for rehearing and the suggestion for an en banc hearing were denied and "no active judge or judge who was a member of the panel" requested that a vote be taken on the suggestion of an en banc hearing (2a-4a).

B. COLOMBIA's negligent unseaworthiness

During the course of the Chief Officer's watch, on August 13, 1972, just 31 days before the collision, the electrical steering system on the COLOMBIA failed (22a). On the following day, August 14, a repairman Mr. Fajardo "was called to fix the steering mechanism" (35a). The District Court found "that Fajardo's inspection was totally inadequate in light of a potentially serious problem with the electrical circuits" (41a); that the "heavy copper corrosion" (40a) on the emergency switchboard panel which "Fajardo and Gomez[4] should have discovered * * * but * * * didn't" was "further evidence of a failure to exercise due diligence to make the ship seaworthy, as well as an indication that the ship's electrical control circuits were not reasonably fit for their ordinary intended purposes when COLOMBIA left Santa Marta, and thereafter, when she left Jacksonville" (40a) on September 13 (12a); that "[w]hen COLOMBIA left Santa Marta, and when she left Jacksonville, she was a floating danger and risk to all nearby craft" (52a); that COLOMBIA's unseaworthiness was a fact which was known to the owners of the vessel" (41a) and that "since the collision was a direct consequence of the loss of power steering, the causal link between the unseaworthiness and the electrical malfunction has been established" (46a).

Although the Court found that "the rapid movement of the rudder to the left following the failure of the steering

[4] Mr. Gomez was "the resident agent for *[Petitioner] in Santa Marta" (36a) and also "was a qualified engineer" (41a). Mr. Fajardo's work was "supervised, assisted and observed by Gomez * * *." (37a)

has no logical and reasonable explanation," it also found that "the failure of the electrical system between the bridge and the steering engine is explained" (45a n.8). This latter circuit "transmitted the impulses from the bridge to the steering engine" (10a) and its inability to function prevented it from operating "the rudder so as to bring the ship to starboard" (34a) and, of course, so as to stop COLOMBIA from continuing to the left. The subsidiary facts upon which the Court based its conclusions of unseaworthiness of COLOMBIA and negligence of the Petitioner and Mr. Fajardo, in failing to properly inspect (34a), discover and correct "the underlying defects in the ship's electrical steering system" (37a), are set forth in the Court's opinion at pages 34a through 44a and 47a.

C. The faults of COLOMBIA and Petitioner

The numerous and egregious faults charged against Rodriguez, COLOMBIA's Chief Officer in charge of the watch, who testified in Court, are set forth in the District Court's opinion (10a-12a, 22a-25a, 51a-52a). "Standing by itself, this negligent navigation was fault of a high order. Additional weight in the scales" was charged to Petitioner because of her unseaworthy condition and "the negligent fashion in which those charged with her inspection and maintenance responded to the prior steering failure at Santa Marta" (52a).

D. The faults of TRANSHAWAII

"Based on the entire trial record, and the • • • findings, and because COLOMBIA's serious shortcomings so far outweigh the blame which is fairly attributable to the TRANSHAWAII's failure to notice COLOMBIA's change of course, the Court apportions responsibility for the collision as follows: TRANSHAWAII—17.5%; COLOMBIA—82.5%" (53a).

Reasons for Denying the Writ

I. Petitioner's negligence in failing to properly inspect and service COLOMBIA's unseaworthy electric steering system serves as a basis for the allocation of some fault.

The petition is founded on the misconception that the Court's opinion assessed liability for unseaworthiness without negligence on the same principle as the breach of a contractual warranty of seaworthiness, or liability to seamen for personal injury based on unseaworthiness without reference to negligence.[5] In fact, the Court's imposition of liability was based on unseaworthiness due to negligence in failing to properly inspect, discover and service the defective unseaworthy electrical steering system after Petitioner had notice of the defect in the system by the breakdown on August 13 (34a, 37a, 40a, 41a). The Court also based liability on "the negligent fashion in which those charged with • • • [COLOMBIA's] inspection and maintenance responded to the prior steering failure at Santa Marta" (52a).

Respondent agrees that its claim against Petitioner must be founded on negligence but that does not preclude assessing some fault for knowingly operating an unseaworthy vessel which "was a floating danger and risk to all nearby craft" (52a) in violation of a "duty, or obligation • • • for the protection of others against unreasonable risks."[6] Negligent unseaworthiness has always been a basis for collision liability. See, for example, *China Union Lines, Ltd.* v. *A. O. Andersen & Co.*, 364 F.2d 769, 786-788 (5th

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[5] See, *Mitchell* v. *Trawler Racer*, 362 U.S. 538, 550 (1960). The concept of unseaworthiness was also used in the course of the Court's opinion in the context of the Limitation of Liability Statute, 46 U.S.C. § 183 (32a) and COGSA, 46 U.S.C. § 1304(1) (46a-47a).

[6] *Prosser, The Law of Torts* (4th ed. 1971) p. 143.

Cir. 1966), affirming 222 F.Supp. 874, *cert. denied* 386 U.S. 933, rehearing denied 386 U.S. 999 (1967).

Respondents affirmatively proved negligent unseaworthiness (41a, 44a). Moreover, Petitioner failed to rebut the presumption of negligence that arises from the breakdown in steering equipment since it failed to "come forward with any explanation as to the reason for the steering failure" (43a). This alone was sufficient basis to charge Petitioner with negligence for failing to make COLOMBIA seaworthy after it had due notice of the vessel's condition on August 13, 1972 at the time of the first breakdown.[7]

The Court of Appeals affirmed the District Court's findings that the Petitioner was negligent in failing to make the COLOMBIA seaworthy with respect to her electric steering system. The subsidiary findings set forth in the District Court's opinion have been concurred in by two courts and Petitioner, under the circumstances, shoulders the onus of showing that they are clearly erroneous, and this it cannot do. (*Graver Mfg. Co.* v. *Linde,* 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Service,* 385 U.S. 630, 635 (1967); *U.S.* v. *Reliable Transfer Co.,* 421 U.S. 397, 401 n.2 (1975).

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[7] *Cranberry Creek Coal Co.* v. *Red Star Towing & Transp. Co.,* 33 F.2d 272, 274 (2d Cir. 1929) *cert. denied sub. nom. New York Marine Co.* v. *Cranberry Creek Coal Co.,* 290 U.S. 596 (1929); *In re Reichert Towing & Transp. Co.,* 251 Fed. 214, 217 (2d Cir. 1918) *cert. denied* 248 U.S. 565 (1918) in which limitation of liability was denied; *The William E. Reed,* 104 F. 2d 167, 168 (2d Cir. 1939); *The Phoebus,* 70 F.Supp. 817, 820, aff'd *sub nom. Panama Transport Co.* v. *The Maravi,* 165 F.2d 719 (2d Cir. 1948); *In re Marine Sulphur Queen,* 460 F.2d 89, 101 (2d Cir. 1972), affirming in part and reversing in part on other grounds, 312 F.Supp. 1081, *cert. denied* 409 U.S. 982 (1972); see also, *Federazione Italiana Dei Cors. A.* v. *Mandansk Compania De. V. (The Perama),* 388 F.2d 434 (2d Cir. 1968), *cert. denied* 393 U.S. 828 (1968) in which a vessel "sank in fair weather and calm seas" from which it was "presumed that the loss was occasioned by unseaworthiness of the *Perama.*" (p. 436); *Griffin on Collision,* p. 547.

II. The apportionment of fault is not clearly erroneous

The Trial Court carefully set forth the navigational faults of both parties and ascribed some additional fault to Petitioner for its negligence in failing to make the vessel seaworthy after notice, and arrived at a conclusion as to apportioning the responsibility. This decision was affirmed by the Court of Appeals. The long established rule has been that assessment of damages presents an issue of fact on review that should not be disturbed unless clearly erroneous. This has been the rule in cases dealing with comparative negligence in personal injury actions. (*U.S.* v. *Reliable Transfer Co.,* 421 U.S. 397, 407 (1975) and since *Reliable Transfer,* has been applied in collision cases. (*Getty Oil, etc.* v. *S.S. Ponce de Leon,* 555 F.2d 328 (2d Cir. 1977);[8] *Feeder Line Tow, Serv. Inc.* v. *Toledo, R. & W.R.R. Co.,* 539 F.2d 1107 (7th Cir. 1976)).

Now that, "the findings of fact with respect to comparative negligence • • • [have been] concurred in by both the District Court and the Court of Appeals, • • • the • • • [Petitioner can] not in this case meet its heavy burden under the 'two-court rule.' *Graver Mfg. Co.* v. *Linde,* 336 U.S. 271, 275. See, *Berenyi* v. *Immigration Service,* 385 U.S. 630, 635." (*U.S.* v. *Reliable Transfer Co., supra,* at 401, n. 2)

III. The Second Circuit did not depart from the accepted and usual course of judicial proceedings.

There was no reason why Petitioner's appeal, without merit, should not have been disposed of summarily by the Second Circuit Court of Appeals. Such action will not only serve to relieve the Courts of Appeals from writing unnecessary opinions but also will help to slow

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[8] Associate Justice Clark sat in this case by designation.

down the gargantuan growth of decisions which may serve no "jurisprudential purpose." (Court of Appeals Rule 0.23)

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: April 13, 1978.

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